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ABSTRACT

Determining whether an employee's First Amendment free speech interests should prevail over legitimate employer concerns for an efficient workplace is a difficult question that this book attempts to answer. To give public employers and public employees an understanding of the legal framework in which free speech issues are decided is the purpose of this book. The first section traces the development of the public employee free speech right in the decisions of the United States Supreme Court, setting forth the basic analytical framework within which these cases are decided. The second section focuses more closely on the variables within the Supreme Court's analytical framework by examining a number of lower court decisions, paying particular attention to the decisions of the North Carolina Court of Appeals, the North Carolina federal district courts, and the Fourth Circuit Court of Appeals. (SI)

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Stephen Allred

A Legal Guide to Public Employee Free Speech in North Carolina

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A Legal Guide to Public Employee **Free Speech** in North Carolina

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PREFACE

DETERMINING whether an employee's First Amendment free speech interests should prevail over legitimate employer concerns for an efficient workplace is a difficult question; this book attempts to provide some answers. Of course, no book can anticipate the innumerable settings in which free speech claims may arise, and predict with certainty the outcome of those disputes. Rather, the purpose of this book is to give public employers and public employees an understanding of the legal framework in which free speech issues are decided, so they may make informed decisions (with the assistance of counsel as needed) as to the proper resolution of these issues as they arise.

The first section traces the development of the public employee free speech right in the decisions of the United States Supreme Court, setting forth the basic analytical framework within which these cases are decided. The second section focuses more closely on the variables within the Supreme Court's analytical framework by examining a number of lower court decisions, paying particular attention to the decisions

of the North Carolina Court of Appeals, the North Carolina federal district courts, and the Fourth Circuit Court of Appeals.

One final note: As with many areas of the law, the scope of the free speech right of public employees continues to evolve. This book provides a "snapshot" of the scope of the right as of 1989. Those who are called on to advise others or to handle disputes in which a free speech claim arises should be sure to review current court decisions before proceeding.

STEPHEN ALLRED
Spring 1989

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INTRODUCTION

THE FIRST AMENDMENT to the United States Constitution states "Congress shall make no law . . . abridging the freedom of speech."[1] The First Amendment's guarantee of free speech is not absolute, however. For example, the right of free speech does not include the right to falsely shout fire in a crowded theater, to make recklessly false statements, or to publish obscenity.[2] Rather, the United States Supreme Court has recognized the possibility of conflict between the rights of the speaker and the recipient of the speech, and has attempted to balance those rights to the point that "we can have both full liberty of expression and an orderly life."[3]

North Carolina state and local government employers are sometimes faced with situations in which employees make statements that call into question the decisions of the employer or that are

1. U.S. CONST. AMEND. I.

2. Schenck v. United States, 249 U.S. 47, 52 (1919); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); Miller v. California, 413 U.S. 15, 23 (1973).

3. Breard v. Alexandria, 341 U.S. 622, 642 (1951).

critical of public officials or programs. Just as there are limitations on free speech in other settings, the protected speech of public employees only extends to matters of public concern.[4] Further, if the speech in question is on a matter of public concern and thus deemed "protected speech," the question arises whether the employee's First Amendment interest should prevail over the employer's legitimate concerns with maintaining order in the workplace.[5] This question is examined in the pages that follow.

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4. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 147 (1983); Rankin v. McPherson, ___U.S.___ 107 S. Ct. 2891, 2897, 97 L.Ed.2d 315, 324 (1987).

5. 391 U.S. at 568 (1968).

I

SUPREME COURT RECOGNITION OF PUBLIC EMPLOYEE FREE SPEECH RIGHTS

A. The Old View: Government Employment as a Privilege

THE COURTS have not always recognized a protected speech right on the part of public employees. Initially the courts viewed government employment as a privilege that could require the employee to give up the constitutional right of free speech. This view, sometimes called the right-privilege dichotomy,[6] held that the government had different responsibilities depending on whether it was depriving an individual of a right (an entitlement) or a privilege (a benefit). Where one was deprived of a constitutional right, then the due process guarantees of the Constitution applied. Where, however, one was simply deprived of a privilege, such as a government job, then one could make no demands for due process because no right was violated.

In the late nineteenth century, Justice Holmes characterized the prevailing view of public employee speech this way in upholding the dismissal of a police officer for criticizing a public official: "The petitioner

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6. W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARVARD L. REV. 1439 (1968).

may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the terms of his contract."[7]

Beginning in the early 1950s, however, the Supreme Court began rejecting the notion that unconstitutional conditions could be placed on receipt of government benefits, including a government job, in a series of cases involving First Amendment freedom of association. Many states in the 1950s and 1960s had requirements that public school teachers take loyalty oaths. These oaths were challenged as unconstitutional, beginning with *Weiman v. Updegraff*.[8] In *Weiman* a loyalty oath that excluded from public employment persons who had innocent, as opposed to knowing, association with certain subversive organizations was held to constitute "an assertion of arbitrary power" by the state.[9] In *Shelton v. Tucker*[10] a schoolteacher refused to sign an affidavit listing organizations to which he belonged. The *Shelton* Court held that a state's indiscriminate requirement that public employees disclose all organizational memberships was an abuse of due process. In *Cramp v. Board of Public Instruction*[11] the Court invalidated a requirement that schoolteachers sign a statement that they had never aided or supported the Communist party as too vague to warrant termination for refusal to sign. Finally, in *Keyishian v. Board of Regents*[12] faculty members of the State University of New York

7. McAuliffe v. Mayor of New Bedford, 155 Mass. 216 (1892).
8. 344 U.S. 183 (1952).
9. *Id.* at 191.
10. 363 U.S. 479 (1960).
11. 368 U.S. 278 (1961).
12. 385 U.S. 589 (1967).

successfully argued that the New York statute requiring them to sign a loyalty oath was an unconstitutional infringement on their First Amendment right of association.

The theory that unconstitutional conditions could be placed on receipt of government benefits was further undermined by the Court's 1963 ruling in *Sherbert v. Verner*.[13] In that case the Court struck down South Carolina's denial of unemployment compensation to a Seventh Day Adventist who refused Saturday work because it violated the First Amendment's guarantee of religious freedom. Stated the Court: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."[14]

B. Recognition of the Free Speech Right: The *Pickering* Decision

IN 1968 the Supreme Court squarely addressed the scope of public employee free speech rights for the first time, in *Pickering v. Board of Education*.[15] In *Pickering* a public school teacher was dismissed for writing a letter to the local newspaper criticizing the school board and the superintendent of schools for funding athletic programs at the expense of academic excellence. The Court held that the termination of the schoolteacher was an impermissible infringement on his protected speech, rejecting the notion "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."[16] Instead the Court held that public

13. 374 U.S. 398 (1963).
14. *Id.* at 404.
15. 391 U.S. 563 (1968).
16. *Id.* at 568.

school teachers and other public employees enjoyed the right (not the privilege) of free speech. The free speech right the Court recognized is the right of the employee or citizen to comment on matters of public interest. Private speech—that is, speech that does not implicate the relationship of the government to the citizen—was not included by the Court in this case.[17] The Court framed the proper inquiry to resolve free speech cases as follows: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[18]

The balancing test established in *Pickering* was, by necessity, stated in general terms. The Court noted the impossibility of anticipating the variety of circumstances in which a public employee's speech might be balanced against the employer's exercise of managerial efficiency, and held instead that in these types of cases three factors are to be considered in striking the balance.[19] These factors, discussed in turn below, are (1) the parties' working relationship,

17. Note that the *Pickering* decision was based on the recognition of three categories of speech: first, protected speech, implicating important First Amendment interests; second, routine speech, which, although perfectly permissible, constitutes no more than common conversations among persons on subjects of private interest having no First Amendment implications (*see, e.g.*, Yoggerst v. Hedges, 739 F.2d 293 [7th Cir. 1984] [public employee's comment to a co-worker concerning rumor that agency director had been fired, "Did you hear the good news?" not protected speech]); and third, outlawed speech, such as obscenity (*see, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 [1973]) or recklessly false statements (*see, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 [1964]).

18. 391 U.S. at 568.

19. *Id.* at 569. Justice Marshall, writing for the Court, indicated "some of the general lines along which an analysis of the controlling interests should run" in evaluating public employee free speech cases, but left open the possibility that factors other than those in *Pickering*

(2) the detrimental effect of the speech on the employer, and (3) the nature of the issue upon which the employee spoke and the relationship of the employee to that issue.

The *Pickering* Court, in evaluating the first factor (the parties' working relationship), noted that the schoolteacher's letter to the newspaper criticized the policies of the school board—not his direct supervisors with whom he had to maintain a close working relationship. The distant nature of the working relationship thus tipped the scales in favor of the employee. There was neither a threat to the immediate supervisor's ability to maintain necessary discipline at the work site nor a demonstration of any disharmony among co-workers resulting from publication of the letter.

The Court evaluated the second factor, the detrimental effect of the speech on the employer, and concluded that the speech did not warrant dismissal of the employee. The employer asserted that any publicly made false statement by the employee was *per se* harmful to the employer. The Court rejected this *per se* rule and held that the nature and content of the speech must be examined in order to make a case-by-case determination of the detrimental impact of the speech on the public service. In this case the statement amounted to nothing more than a difference of opinion over allocation of school board funds, and the mere act of airing an opinion in the newspaper did not have sufficient effect on the school board's ability to make that allocation to justify firing the employee.

The third factor, the nature of the issue and the

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might be controlling, given the "enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal." *Id.* at 569-70.

employee's relationship to that issue, was also resolved in favor of the employee in *Pickering*. The matter of public concern before the Court was the allocation of funds, which was to be resolved through a referendum by the voting public. As a schoolteacher Pickering and his co-workers were "the members of the community most likely to have informed and definite opinions"[20] on the matter. Where there is a close nexus between the employee and the issue, the possibility that the employee will make a valuable contribution to public understanding may tip the scales in favor of protecting the employee's speech.

In sum, *Pickering* established a test that was both a broad framework for balancing the free speech rights of public employees against the public interest in efficient public service, and, within that framework, a more specific listing of the factors to be considered in striking the ultimate balance.

C. Burdens of Proof: The *Mount Healthy* Decision

NEARLY A DECADE after the *Pickering* case was decided, the Supreme Court again addressed the issue of public employee free speech in *Mount Healthy Board of Education v. Doyle*.[21] This decision clarified the burden of proof a government employer must meet in dismissing an employee under *Pickering*.

The *Mount Healthy* case involved the decision of a school board not to renew the contract of Doyle, an untenured public school teacher, for calling a radio station to report the establishment of a dress code for teachers. The radio station broadcast the report as a news item. At the end of the school year, the school board chose not to renew Doyle's appointment, citing the adverse publicity the school system had received

20. *Id.* at 571-72.
21. 429 U.S. 274 (1977).

as a result of the radio report as the major reason for its action. The school board also cited Doyle for unprofessional conduct and for using obscene gestures in dealing with students. Doyle challenged his nonrenewal as a violation of his First Amendment free speech rights.

The Supreme Court agreed with the lower court (the Ohio District Court) in its determination that Doyle's call to the radio station constituted free speech on a matter of public concern. The Court further held that the *Pickering* test was applicable to Doyle's case. The Court disagreed with the lower court, however, on the extent to which Doyle had to show that his firing was due to the exercise of his free speech rights in order to successfully overturn the action.

The lower court had held that if an employee could show that the exercise of free speech rights played "a substantial part" in the decision to dismiss the employee, then a constitutional violation requiring remedial action had been established. The Supreme Court disagreed and held that something more was required than a showing that the exercise of free speech by the employee played a substantial part in the decision. Apparently concerned that justifiable terminations might be overturned by an employee's invocation of a free speech claim, the Court expressed the view that merely requiring the employee to show that the free speech played a substantial part in the decision to terminate the employee could place the employee "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[22]

The proper burden of proof, held the Court, is initially on the employee to show (1) that the employee was engaged in constitutionally protected

22. *Id.* at 285.

conduct and (2) that this conduct was a motivating factor in the decision to terminate the employee. If the employee meets both tests, a *prima facie* (presumably true) case will have been established. The burden then shifts to the employer, who must rebut the employee's *prima facie* case by showing, by a preponderance of the evidence, that the termination would have occurred irrespective of the protected activity. In Doyle's case, in other words, the burden on the school board would be to show that his contract would not have been renewed even if he had not called the radio station—that his contract would not have been renewed in any event because of his unprofessional conduct and his use of obscene gestures to students. Stated another way, Doyle's burden was to show that "but for" his exercise of his free speech rights, he would have been retained as a schoolteacher.

The effect of *Mount Healthy* is that even if a public employee can show that the balance of interests under *Pickering* should be resolved in the employee's favor, the analysis is not at an end. The public employer may demonstrate that notwithstanding the protected conduct by the employee, the employer would still have dismissed the employee; if the employer does so, then the dismissal stands.

Mount Healthy added a significant hurdle to be cleared by the employee claiming the protection of *Pickering*.

D. The *Connick* Decision and the Narrowing of *Pickering*

IN 1983 the Supreme Court again examined the question of free speech rights of public employees in *Connick v. Myers*.[23] *Connick* involved the circulation of a questionnaire by an assistant district attor-

23. 461 U.S. 138 (1983).

ney. Informed that she was to be transferred to another section of criminal court, she sought her coworkers' views on office morale, the need for a grievance committee, and management pressure to work on political campaigns. The Court created a new two-pronged test in *Connick* to determine whether the *Pickering* balancing test should be applied: (1) Does the speech involve a matter of public concern? (2) If so, does the employee's First Amendment interest outweigh the employer's interest in an efficient public service? If the answer to both questions is yes, the *Mount Healthy* case still requires a showing that the employee's speech was a motivating factor in the decision to discipline the employee, which the employer could rebut only by proving that the discipline would have been imposed irrespective of the protected conduct of the employee. It was against this standard that the assistant district attorney's questionnaire was evaluated.

The questionnaire consisted of fourteen entries.[24] Only one entry, the question concerning pressure to work for office-supported candidates, touched on a matter of public concern, according to the Court. Because that question was "a matter of interest to the community upon which it is essential that public employees be able to speak out freely,"[25] application of the *Pickering* balancing test was warranted. The

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24. *Id.* at 155 (Appendix A). Questions one through five asked employees to describe their experience with office transfers. Questions six through nine asked employees about the existence of a rumor mill and its effect on morale. Question ten asked for an assessment of the supervisory staff. Question eleven asked whether employees were pressured to work on political campaigns on behalf of candidates supported by the district attorney. Questions twelve through fourteen asked whether a grievance committee was needed, whether morale in the office was good, and whether any other issue of concern to the employees needed to be addressed.

25. 461 U.S. at 149.

Court then considered the employer's right to maintain an efficient office by removing a disruptive employee against the employee's right to redress unwilling participation in political campaigns. This was done in the context of a questionnaire that was otherwise characterized as a personal grievance, and the Court resolved the balance in favor of the employer.

The *Connick* Court was particularly concerned that employees might contest routine personnel decisions as free speech infringements, stating "[g]overnment offices could not function if every employment decision became a constitutional matter."[26] Rather, stated the Court, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[27]

In *Connick* the Court made it more difficult for an employee to invoke the *Pickering/Mount Healthy* test by holding that a threshold inquiry (an initial determination) must be made to classify the speech as a matter of public concern. This is the first prong of the test. Only if application of the first prong resulted in a determination that the speech was on a matter of public concern would the second prong of the test, the balance of interests originally identified in *Pickering*, be applied.

E. A Slight Adjustment: *Rankin v. McPherson*

IN 1987 the Court was presented with a case in which a data-entry clerk had been fired from a sheriff's department for saying, upon hearing of the attempted assassination of President Reagan, "[I]f they go for him again, I hope they get him." The decision, *Rankin*

26. *Id.* at 144.

27. *Id.* at 146. The Court further noted that "a federal court is not

v. McPherson,[28] held that the statement was made in the context of a conversation addressing the administration's domestic policies, and that since the overall conversation was on a matter of public concern, the first prong of the *Connick* test was satisfied. Applying the second prong of the test, the Court found no evidence that the employee's statements had interfered with the government's interest in efficient functioning of the office or had otherwise discredited the office, as the speech had been made in private by a low-level clerk to her co-worker–boyfriend.

The Court made a slight adjustment in the law governing free speech of public employees in the *Rankin* case, essentially granting greater latitude to lower-level workers than to higher-ranking employees in weighing the competing interests of the parties:

> [I]n weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal.[29]

The *Rankin* case thus tilted the balance a little

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the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* The ramifications of broadly defining a matter of public concern include the presumption "that all matters which transpire within a government office are of public concern . . . [and] that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." Id. at 149.

28. ___ U.S. ___, 107 S. Ct. 2891, 97 L.Ed.2d 315 (1987).

29. ___ U.S. at ___, 97 L.Ed.2d at 328.

toward employee free speech interests, both by characterizing an outrageous statement as speech on a matter of public concern and by requiring a greater showing of disruption to the workplace where the employee was not in a confidential, policymaking, or public contact position.

F. Summary

THE SUPREME COURT has interpreted the First Amendment's guarantee of free speech in the context of public employment to recognize legitimate interests on both sides of the balance scales. For employees, the right to comment on matters of public concern is not abandoned as a condition of employment; they retain the right they enjoy as citizens to express opinions on matters of public interest. For employers, the right to maintain an efficient operation, free from undue disruption and disharmony, is protected; the public manager is not powerless to react to speech that adversely affects the manager's authority or organization. The Supreme Court's decisions, while instructive, do not provide a clear set of rules to govern the limits of free speech.

The next section looks at the decisions of the lower courts having jurisdiction over North Carolina public employers and employees to see how the Supreme Court's rulings have been applied.

II

RULINGS ON FREE SPEECH CASES BY LOWER COURTS

A. A Note on Jurisdiction

ARTICLE III of the United States Constitution sets up the Supreme Court and authorizes lower federal courts. Congress has created a system of ninety-seven trial courts called federal district courts, and a system of twelve appellate courts, divided by geographic regions, called circuit courts. There are three federal district courts in North Carolina: the Eastern District, the Middle District, and the Western District. Appeals from North Carolina federal district courts are heard by the Fourth Circuit Court of Appeals, which also hears appeals from federal district courts in Maryland, West Virginia, Virginia, and South Carolina.

Article IV of the North Carolina Constitution creates the North Carolina judicial system, called the General Court of Justice, under a structure that parallels the federal system. The General Court of Justice is composed of the District Court Division, the Superior Court Division, and the Appellate Division. Trials are heard in both the district court and the superior court. Appeals are to the North Carolina Court of Appeals. Some cases can be taken from the

North Carolina Court of Appeals to the North Carolina Supreme Court.

Federal courts have jurisdiction over federal questions—that is, cases that arise under the laws, treaties, or the Constitution of the United States. The amount in controversy must be at least $10,000 before the federal court can assert jurisdiction over the matter. State courts may also hear federal questions; federal courts do not have exclusive jurisdiction over cases involving federal questions.

In North Carolina, then, a public employee could choose to bring a claim that the employee's First Amendment right of free speech had been violated—a federal question—either in federal district court or in North Carolina Superior Court. If the case is in state court, appeal by either party would go to the North Carolina Court of Appeals and, if appropriate, from there to the North Carolina Supreme Court. If the employee filed the claim in the state court, however, the public employer, as the defendant, would have the right to have the case transferred to federal district court (this is termed *removal jurisdiction*), or the employer could choose to let the state court hear the case. If, on the other hand, the public employee starts the case directly in federal district court, or the employer removes it there, that court would hear the case initially and the appeal by either side would be to the Fourth Circuit Court of Appeals. Appeals from the Fourth Circuit, as from any circuit court, may only be made by permission of the United States Supreme Court.

Whether the case is in state court or in federal court, the controlling law is *federal* law. The United States Supreme Court decisions discussed in Section I completely govern the disposition of the employee's claim. With that in mind, the decisions of the North Carolina state courts and the federal courts are examined below.

B. Classifcations of Free Speech

SINCE THE 1983 DECISION in *Connick v. Myers*, there have been more than 300 applications of the *Connick* standard by all the federal courts to determine whether a statement by a public employee constituted speech on a matter of public concern and, if so, whose interests should prevail. Of those 300-plus decisions, seven cases arose in North Carolina, and another five cases arose elsewhere in the Fourth Circuit. These decisions, as well as a representative sampling of decisions from other federal circuits, are discussed below.

The majority opinion in *Connick v. Myers* describes a continuum along which any given statement by a public employee may fall, from speech that has so little value that the state could prohibit it (such as obscenity) to speech on matters of vital interest to the electorate (such as Pickering's letter to the newspaper decrying the use of school funds).[30] The 300-plus decisions rendered by the courts involve statements by public employees that fall all along the continuum.

What follows is a rough placement of speech into six categories along the continuum: (1) speech on matters of current community debate, (2) speech alleging malfeasance or abuse of office, (3) speech on public safety and welfare, (4) speech on quality of public education, (5) speech concerning discrimination, and (6) speech on matters of purely personal interest. At each extreme the outcome is easy to predict. Most cases are not at the extremes, however, and prediction is difficult. Further, a word of warning: Within each category there are conflicting opinions by the various federal courts. These categories are only useful as rough indicators of where the speech may fall on the continuum.

30. 461 U.S. at 147.

1. *Speech on Matters of Current Community Debate*

AT ONE END of the spectrum lies a category of cases in which the speech clearly constitutes a matter of public concern: speech on an issue of current community debate. In these cases the speech by the public employee is made in a public forum of some sort, such as a meeting held by government officials to solicit the views of interested parties, or through a letter to a local newspaper or administrative body. Wherever made, the employee's speech is in opposition to a position taken by the employer. The employee is disciplined (sometimes dismissed) and claims the discipline was in violation of the employee's First Amendment right to speak on a matter of public concern.

In many of these cases the employee has no direct interest in the outcome of the issue spoken about, in that the employee's job is not threatened by the ultimate resolution of the issue. Thus, unlike Sheila Myers in the *Connick* case, who was motivated by concern about her own job security, the plaintiffs in many of these cases speak "as members of the community most likely to have informed and definite opinions."[31] In all of these cases the issue about which the employee speaks has received recent attention in the community at large, through the newspaper or in some other public way.

In a case arising in the judicial district that includes North Carolina, *Whalen v. Roanoke County Board of Supervisors*,[32] plaintiff Richard Whalen, an engineer employed by Roanoke County, Virginia, spoke in March of 1976 before the State Corporation Commission. Whalen voiced his opposition to a power company's proposal to erect power lines through Floyd County, where he lived. When asked, Whalen identified himself as a Roanoke County employee but did

31. Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968).
32. 769 F.2d 221 (4th Cir. 1985).

not purport to speak as a representative of the county. The morning after his appearance before the commission, Whalen was fired by his supervisor. That termination was immediately revoked at the advice of the county attorney, and Whalen continued his employment with the county for another three years. In 1979 Whalen was fired again, allegedly for engaging in a real-estate transaction involving county property from which Whalen benefitted personally. Whalen claimed his termination was in retaliation for his testimony, three years earlier, before the commission.[33]

A divided court held that the testimony given by Whalen before the commission was speech on a matter of public concern under the first prong of the *Connick* analysis. Further, held the court, under the second prong of *Connick*, Whalen's right to comment on a matter of public concern outweighed the county's interest in promoting the efficiency of the public service, particularly where Roanoke County had no interest in the location of a power line in Floyd County. The court noted that the county does have an interest in ensuring that employees do not represent it without authority, but that where, as here, the employee spoke for himself and not as a representative of Roanoke County, no such interest was impaired. Applying the *Mount Healthy* standard, the court upheld the finding by the jury that Whalen was fired for his protected conduct, and that Roanoke County would not have dismissed him absent that conduct.

Another decision from the Fourth Circuit illustrates the difficulty employees may face in convincing the court that their speech is on a matter of public

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33. *Id.* at 222-24. The dissent noted the extended time between Whalen's testimony and his dismissal and concluded "there was no more than a mere remote possibility that Whalen's 1979 discharge resulted from Whalen's 1976 speech." *Id.* at 229.

concern. In *Jurgensen v. Fairfax County, Va.*[34] a police officer released an internal report on problems in a county emergency response office to a reporter for the *Washington Post*. The court held that the internal report released by Officer Jurgensen was "at best [of] . . . limited public concern,"[35] but nonetheless proceeded to apply the second prong of *Connick* to balance the limited First Amendment interest of Jurgensen against the employer's interest in disciplining him for releasing the report in violation of county regulations.

The court struck the balance in favor of the employer, given that under the first prong of *Connick* "the report in this case had no more the quality of a matter of public concern than the language of the plaintiff in *Connick*."[36]

Judge Ervin filed a concurring opinion in *Jurgensen*, in which he found the court's discussion of the second prong of *Connick* unnecessary because the first prong was dispositive:

> Being convinced that once a determination has been made that the expression under scrutiny does not deal with a matter of "public concern," it is neither necessary nor appropriate to engage in such "interest balancing." I prefer to base the decision solely upon the ground that the audit report did not deal with a matter of "public concern."[37]

Judge Butzner filed a dissent in *Jurgensen*, stating:

> Upon consideration of the record, I conclude that Jurgensen's interest as a citizen, in disclosing the report to the press, outweighed the interest of the county, as an employer, in promoting the efficiency of the communications center through its orders, including those restricting access to the press. Jurgensen disclosed a matter of public interest. He did not merely voice a personal opinion,

34. 745 F.2d 868 (4th Cir. 1984).
35. *Id.* at 888.
36. *Id.*
37. *Id.* at 891 (Ervin, J., concurring).

> colored by his own perceptions of the condition of the Center. On the contrary, his disclosure of the Center's problems rested on an authoritative report that revealed in great detail the inefficiencies of the Center and recommended steps, including the expenditure of public funds, to remedy them.[38]

Further, Judge Butzner concluded that Jurgensen met his burden of proof under *Mount Healthy*, as his conduct in furnishing the report was protected, and that the act of furnishing the report was the motivating or "but for" factor leading to his discipline.

Other courts have been faced with comparable situations and have ruled much the same as the Fourth Circuit. For example, in *Micilcavage v. Connelie*[39] Joseph Micilcavage, a New York State police officer, was disciplined for violating a department rule prohibiting public speeches by employees without prior authorization from the superintendent. Micilcavage spoke on drug and alcohol abuse before a local PTA, and was issued a letter of censure and placed on six months probation for failing to obtain clearance as required by the police administrative manual.

The court held that the speech in this case clearly constituted a matter of public concern under *Connick*, stating it "concerned a subject that is at the forefront of the public interest."[40] Proceeding to the second prong of the *Connick* test, the court held that the police department's regulation requiring authorization before an officer makes a public presentation was "reasonably related to the promotion of employee discipline and protection of the reputation of the New York State Police,"[41] but ultimately resolved the matter in favor of the employee.

The *Whalen* and *Micilcavage* cases illustrate

38. *Id.* at 894 (Butzner, J., dissenting).
39. 570 F. Supp. 975 (N.D.N.Y. 1983).
40. *Id.* at 976-77.
41. *Id.* at 981-82.

application of the *Connick* test to employee speech in a public forum on a matter of current community debate. Another case, *Anderson v. Central School District No. 6*,[42] involved written expression by a public employee on a matter of current community debate. In *Anderson* a teacher-coach was suspended for sending a letter to school board members describing his proposal for restructuring the athletic program. Plaintiff Anderson sent his letter as a follow-up to remarks he made at an open meeting held by the board to discuss school athletics. The court, applying *Connick*, held that Anderson's letter was on a matter of public concern. The court rejected the school district's argument that because Anderson's letter contained details of his proposed restructuring that were not of general public interest the letter was not protected speech:

> It cannot be disputed, however, that the subject of the letter was the athletic program itself, the very subject discussed at the public meeting called by the Board and which the defendants agree was of public concern. The letter should not lose its status as a communication protected by the first amendment merely because it contains some details. *Connick* does not require every word of a communication to be of interest to the public.[43]

The court also upheld the lower court's application of the *Pickering* balancing test in favor of the employee.

In these cases and others[44] courts have held that the subject in question was a matter of public concern because it was a matter of current community debate and interest. This result is not surprising, as this is clearly the type of speech both the *Pickering*

42. 746 F.2d 505 (9th Cir. 1984).

43. *Id.* at 507.

44. *See also* Zook v. Brown, 748 F.2d 1161 (7th Cir. 1984); McGee v. South Pemiscot School Dist., 712 F.2d 339 (8th Cir. 1983).

and *Connick* courts envisioned as involving a matter of public concern. Note also that in most of these cases the public employee was not in a situation in which resolution of the debate might have an adverse impact on the employee's position. It appears that an employee's lack of personal involvement in the issue increases the chance that the speech will be held protected and that the balancing test will be resolved in the employee's favor.

2. *Speech Alleging Malfeasance or Abuse of Office*

CLOSELY RELATED to the first category of cases is a second group of decisions in which the speech by the employee concerns possible malfeasance or abuse of public office. Like the first category of cases, these cases generally lie at the protected speech end of the continuum. Two cases involving North Carolina public employees are examined first.

In *Johnson v. Town of Elizabethtown*[45] Town Clerk Deborah Johnson raised certain concerns about town management practices. Specifically, Johnson cited as improper the use of a facsimile stamp on town checks by the town administrator, the payment of tax collection fees without first obtaining written authorization by the town administrator, and the notarizing of right-of-way easements not signed in her presence. Johnson also complained to the town administrator about her long hours and low salary. She was dismissed, and filed suit claiming her termination was in retaliation for her criticism of town management.

The court held that Johnson's comments about the facsimile stamp, tax collection, and the notarization procedure constituted speech on matters of public concern. Even though her speech was protected, the

45. 800 F.2d 404 (4th Cir. 1986).

court, applying *Mount Healthy*, found that Johnson's dismissal was not attributable to her protected speech, but rather to her hostility to and incompatibility with her co-workers. No showing was made that the town board, in its deliberations on whether to dismiss Johnson, had even considered her speech questioning proper administrative procedures.

Similarly, in *Cranford v. Moore*[46] a police officer for the city of Concord was fired for writing a series of four letters to the local newspaper. The first letter concerned overtime pay for police officers; the second proposed a new method of electing aldermen; the third criticized the aldermen for approving a nuclear power plant; and the fourth stressed the importance of citizens being able to openly criticize the executive branch of the United States government.

Two months following his last letter, the officer was terminated. Although the letters clearly constituted speech on matters of public concern, the officer failed to establish a sufficient link between his letter-writing activity and his dismissal. Under the *Mount Healthy* standard, the city successfully demonstrated that the officer was dismissed for giving preferential treatment in writing parking tickets, and not for the exercise of his free speech rights.

Other courts have also considered free speech claims involving allegations of malfeasance or abuse of office. For example, in a case arising in the Fourth Circuit, *Buschi v. Kirven*,[47] seven employees of the State Western Mental Hospital in Staunton, Virginia, were dismissed and claimed their dismissal was in retaliation for the exercise of their free speech rights. The employees brought complaints of patient abuse, racial discrimination, mismanagement, waste, and

46. 587 F. Supp. 712 (M.D.N.C. 1984).
47. 775 F.2d 1240 (4th Cir. 1985).

misuse of state funds to a variety of officials, including the hospital staff, the media, the Equal Employment Opportunity Commission, and various public interest groups.

The court held that the employee's complaints were protected speech under *Connick*. In affirming the lower court's ruling, the Fourth Circuit opinion noted that determinations of whether speech is on a matter of public concern are made irrespective of the truth or falsity of the statements. The court upheld the lower court determination, however, that the interest of the hospital in efficiency, discipline, and administration of the agency outweighed the employee's interests in bringing these complaints to the public.

Other federal circuits have also ruled on cases in which public employees alleged malfeasance or abuse of office. In *Gonzales v. Benavides*[48] plaintiff Edgardo Gonzales, executive director of a federally funded antipoverty program, questioned whether the local board of county commissioners and the commissioners' court had complied with federal regulations in reinstating an employee Gonzales had terminated. Gonzales also disputed the commissioners' view that he was subject to evaluations of his performance by the commissioners, and refused to publicly acknowledge their authority in conducting these evaluations. Following these incidents, Gonzales was dismissed; he filed suit claiming his dismissal was in retaliation for questioning the propriety of the board's actions.

The court, applying the *Connick* two-pronged test, first held that Gonzales's speech was on a matter of public concern. The court reasoned that in raising the possibility that the board's actions in reinstating the terminated employee were in violation of federal

48. 774 F.2d 1295 (5th Cir. 1985).

regulations, Gonzales was speaking on a matter that, if true, could result in county residents losing millions of dollars in federal assistance. Noted the court, "while such a catastrophe may have been unlikely, we believe the importance of the programs at stake raised the issue to a matter of significant public concern."[49] The court further held that the question of whether the commissioners' court complied with federal regulations was a matter of public concern. Finally, the court held that the question of allocation of authority and responsibilities among the board, the commissioners' court, and the office of the executive director was a matter of public concern.

Turning to the second prong of the *Connick* test, the court considered the governmental interest at stake. First, the court evaluated the nature of the working relationship of the parties, and concluded that no close working relationship between Gonzales and the board or commissioners' court was required. However, the court sustained the lower court's finding that, irrespective of the absence of a close working relationship, Gonzales occupied a particularly sensitive policy-making position in which he could frustrate the policies of the commissioners. Second, the court examined the government's interest in requiring the loyalty of a key executive employee. The court found that the employer had made no showing that Gonzales's speech was likely to undermine the commissioners' policies, nor that his failure to publicly acknowledge the authority of the commissioners posed a threat to the operation of the agency. Gonzales had not challenged the commissioners' authority, held the court, but had only protested that, in exercising their authority, the commissioners had violated agency regulations. The court

49. *Id.* at 1301.

considered the balance between Gonzales's free speech rights and the governmental interest in maintaining a loyal, nondisruptive working relationship and struck that balance in favor of the employee.

In both the *Gonzales* and *Johnson* cases the employee was involved in a personal dispute with the public employer. That fact was not dispositive, however, as Edgardo Gonzales was able to prevail in the application of the second prong of the *Connick* test. Yet where the employee is not involved in a personal dispute with the employer and brings to light allegations of malfeasance or abuse of office, the courts appear more likely to rule that the speech in question is on a matter of public concern. Some of those decisions are discussed below.

In *Czurlanis v. Albanese*[50] plaintiff John Czurlanis appeared before a county governing board and made allegations of inefficiency, falsification of reports, and the performance of unnecessary repairs in the county motor vehicles department in which he worked. Four days after his appearance, Czurlanis was transferred to a less desirable garage and suspended for ten days for failure to use the grievance procedure to air his complaints. Czurlanis spoke at the next board meeting against certain tax expenditures and received a thirty-day suspension. Czurlanis claimed his First Amendment rights were abridged by the suspensions.

The court held that Czurlanis's speech was on a matter of public concern. The content of Czurlanis's remarks fell "squarely within the core public speech delineated in *Connick*"[51]—whether public officials were properly discharging their governmental responsibilities. In holding that Czurlanis met the first prong

50. 721 F.2d 98 (3rd Cir. 1983).
51. *Id.* at 104.

of the *Connick* test, the court emphasized that Czurlanis did not discuss his own working conditions as an aggrieved employee, but rather spoke only as a citizen and taxpayer at a public forum called for just such purposes. Proceeding to the second prong of the *Connick* test, the court found no evidence that Czurlanis's speech undermined the authority of his supervisor, nor that the operations of the employer were disrupted; indeed, any disruptions that did occur were the result of his superiors' attempts to suppress his speech. The court also held that the failure to abide by the "chain of command" was excused, finding that "[a] policy which would compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill such speech."[52]

A number of other decisions have been rendered in which public employees who were not involved in any personal dispute brought to light alleged malfeasance or abuse of office constituting, in the courts' view, speech on matters of public concern. For example, in *Brown v. Texas A&M University*[53] a university accountant who reported possible financial impropriety by university officials was held to be engaged in protected speech. In *Thomas v. Harris County*[54] a police officer's criticism of what he perceived to be favored treatment by the department of a private security force in a residential subdivision was held to satisfy the first prong of the *Connick* test. Similarly, in *Brocknell v. Norton*[55] the court held that

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52. *Id.* at 106. *See also* Solomon v. Royal Oak Township, 656 F. Supp. 1254, 1262-63 (E.D. Mich. 1986) (no requirement to follow chain of command in police department where to do so would be futile).

53. 804 F.2d 327 (5th Cir. 1986).

54. 784 F.2d 648 (5th Cir. 1986).

55. 732 F.2d 664 (8th Cir. 1984).

a police officer's telephone call to a municipal training instructor to report that a fellow officer had a copy of an examination to be given was an issue of public concern, noting that the public has a vital interest in the integrity of police officers. Likewise, in *Greenberg v. Kmetko*[56] a social worker's criticism of the department's handling of certain cases, aired at a meeting of the department's oversight board, was held to constitute speech on a matter of public concern that outweighed the disruptive effect produced by the employee's criticism. And in *DiFranco v. City of Chicago*[57] a city employee's complaints that a fellow employee was using city equipment to perform non-city work during work hours and that the mayor's husband was using city-owned photographs on his private Christmas cards were held to be protected speech concerning the diversion of public resources for private or political use.[58]

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56. 811 F.2d 1057 (7th Cir. 1987).

57. 642 F. Supp. 243 (N.D. Ill. 1986).

58. *See also* Marohonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986) (speech consisting of cooperation with investigation into fraudulent medical billing by public employer touched on matter of public concern); Solomon v. Royal Oak Township, 656 F. Supp. 1254, 1262 (E.D. Mich. 1986) (report of corruption in police department protected speech, with balance of interests in employee's favor); Egger v. Phillips, 710 F.2d 292, 317 (7th Cir. 1983) (allegations of corruption in FBI held protected speech); McMurphy v. City of Flushing, 802 F.2d 191 (6th Cir. 1986) (accusations of misconduct by city manager and police chief protected); O'Brien v. Town of Caledonia, 748 F.2d 403, 407 (7th Cir. 1984) (informing public of potential graft and corruption protected speech); Rookard v. Health and Hospitals Corp., 710 F.2d 41, 46 (2d Cir. 1983) (exposing corruption and waste in government is "obviously" a matter of public concern); Twist v. Meese, 661 F. Supp. 231 (D.D.C. 1987) (allegation that U.S. Department of Justice officials obstructed an investigation is speech on a matter of public concern); Petrozza v. Incorporated Village of Freeport, 602 F. Supp. 137 (E.D.N.Y. 1984) (speech by city plumbing inspector alleging code violations by city contractors brought to light breach of public trust and is protected); Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986) (employee's disclosure of tax violations by government employees to press was speech on a matter of public concern).

In this second category of cases it appears that if the speech concerns malfeasance or abuse of office *and* the employee speaks as a concerned citizen, not as an aggrieved employee, then the courts will likely find that the employee has satisfied both prongs of the *Connick* test. Yet, where the employee who speaks on alleged malfeasance or abuse also has a personal dispute with the employer, the speech may not be deemed protected.

3. *Speech on Public Safety and Welfare*

IN THE THIRD CATEGORY of cases an employee speaks out on an issue that may be broadly characterized as concerning public safety and welfare. In these cases, usually involving public safety personnel, the employee voices concern about the ability of the employer to adequately execute its public safety responsibilities, or speaks out on employer practices that allegedly undermine the welfare of employees.

Three recent decisions typify those concerning the question of public safety. In *Brown v. Port Authority of N.Y. & N.J.*[59] a lieutenant in the security force assigned to John F. Kennedy Airport was disciplined after he wrote a memo to his superiors and to his union saying that airport security was not sufficient to repel terrorist activity. Although the memo also addressed the plaintiff's personal safety concerns, noted the court, the memo essentially concerned the ability of the airport to respond to a matter of the utmost public concern—terrorism. In *Knapp v. Whitaker*[60] a public school teacher was discharged after he wrote a letter to school board members concerning the failure of the school system to provide adequate liability insurance for coaches and volunteer parents who transport students to athletic events.

59. 656 F. Supp. 517 (E.D.N.Y. 1987).
60. 757 F.2d 827 (7th Cir. 1985).

The court held that this speech concerned with providing adequate protection of volunteers was likewise a matter of public concern. And in *Koch v. City of Hutchinson*[61] a fire marshal was demoted after the public release of one of his fire inspection reports, which stated that the fire had been caused by arson, contrary to the findings of other investigators. The local newspaper published stories of internal debate over the cause of the fire, and the city claimed the resulting disruption of the department warranted the employee's demotion. The court held that the release of the report aided the public in evaluating the conduct of the government in discharging its duty to investigate possible arson and reduce the likelihood of fires, and was a matter of public concern.

A public employee who speaks on matters of public safety and employee welfare may invoke First Amendment protection against retaliatory discharge.

4. *Speech on the Quality of Public Education*

NUMEROUS CASES have arisen in which schoolteachers and university professors have questioned actions of their employers as undermining the quality of public education. As in the other categories of cases discussed above, the employee is sometimes involved in a personal dispute with the educational institution over the issue in question. The question presented is whether the employee's speech is merely a personal disagreement with the employer, or an issue of educational policy constituting a matter of public concern. If it is the former, the court will dispose of the claim on the first prong of the *Connick* test; if the latter, the speech falls on the spectrum of protected speech, and the balance of interests must be applied.

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61. 814 F.2d 1489 (10th Cir. 1987).

The North Carolina Court of Appeals has rendered two decisions involving free speech claims by university professors since the *Connick v. Myers* standard was established by the United States Supreme Court.

The first case, *Pressman v. UNC–Charlotte*,[62] involved a free speech claim by a visiting professor at the University of North Carolina at Charlotte's College of Architecture. The professor, Maurice Herman, was appointed to a position exempt from permanent tenure consideration. In February, 1982, Herman informed the dean of the architecture school, Charles Hight, that he wished to be considered for a tenure track position. Later that spring Herman spoke at a faculty meeting, criticizing the way in which Dean Hight administered the school and expressing "his concern over the lack of opportunity for personal development because of heavy workload, lack of guidance for grading, failure to develop a master's program, failure to recruit quality students and faculty, and inadequate or inappropriate educational direction for the College of Architecture."[63] One month following his speech at the faculty meeting, the dean of the architecture school denied Herman's request for reappointment to a tenure track position. Herman filed suit in North Carolina Superior Court alleging he was deprived of his First Amendment free speech right because he was fired for his criticism of the way in which the architecture school was run.

The superior court granted summary judgment to the university on Herman's First Amendment claim, and Herman appealed. The North Carolina Court of Appeals examined Herman's speech to de-

62. 78 N.C. App. 296 (1985).
63. *Id.* at 298.

termine whether, under *Connick v. Myers*, it was on a matter of public concern. The court held that it was not:

> [Herman's] speech can be more accurately described as an employee grievance concerning internal policy. Herman's speech during the meeting concerned Dean Hight's lack of administrative competence . . . . We find Herman's criticism not based on public-spirited concern but more narrowly focused on his own personal work and his personal displeasure with internal policies.[64]

Thus, as Herman's comments were held to constitute a purely personal grievance and not speech on a matter of public concern, the first prong of the *Connick* test was answered in the negative, and Herman's nonrenewal was upheld.

The second case, *Leiphart v. N.C. School of the Arts*,[65] also involved criticism of a dean by a faculty member. Wesley Leiphart was the director of student activities in the Student Services Department at the North Carolina School of the Arts, a position he had held for six years. While his supervisor, Dean Patricia Harwood, was attending an out-of-town conference, Leiphart called a meeting with four other division directors to present a list of complaints he had received about the department and Dean Harwood. When Dean Harwood returned from the conference and learned of the meeting, she fired Leiphart for attempting "to totally sabotage my authority as Dean of Student Services and to undermine any authority or leadership I might have with my immediate staff."[66] Leiphart filed suit in North Carolina Superior Court claiming his firing violated his First Amendment freedom of speech.

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64. *Id.* at 301-02.
65. 80 N.C. App. 339 (1986).
66. *Id.* at 342.

The lower court and the court of appeals rejected Liephart's claim, citing the *Pressman* case discussed above. The court held that Leiphart's speech "focused on his own personal displeasure with the Dean's internal policies [and] was not based on public-spirited concern."[67] Just as in the *Pressman* case, then, Leiphart failed to satisfy the first prong of the *Connick* test.

Other courts, when faced with similar facts, have sometimes taken a different view. For example, in *Johnson v. Lincoln University*[68] plaintiff William Johnson, a professor at Lincoln University in Pennsylvania, was removed as chairman of the chemistry department. Johnson had criticized the president of the university for his proposal to substantially reduce the number of faculty positions, which would, in Johnson's view, lower the academic standards of the university. Indeed, Johnson "was apparently 'in the forefront of the faculty dissidents and was quite outspoken in his criticism of [the president].'"[69] Johnson's criticism took two forms: controversies within the chemistry department, which were marked by shouting and name-calling incidents, and letters to the Middle States Association of Schools.

The court held that both the angry speech at department meetings and the letters to the association constituted speech on a matter of public concern. In evaluating the content, form, and context in which the speech took place, the court cited the Supreme Court's ruling in *Tinker v. Des Moines School District*[70] for the proposition that "in an academic environment, suppression of speech or opinion cannot be justified by an 'undifferentiated fear or appre-

67. *Id.* at 355.
68. 776 F.2d 443 (3rd Cir. 1985).
69. *Id.* at 448.
70. 393 U.S. 503, 508 (1969).

hension of disturbance.'"[71] The court, the Third Circuit Court of Appeals, sent the case back to the trial court for further proceedings on the questions of striking the balance of interests and determining the cause of Johnson's demotion.

Most courts have taken the approach of the North Carolina Court of Appeals in cases with comparable facts, however. For example, in *Landrum v. Eastern Kentucky University*[72] a professor claimed he was denied tenure for criticizing the dean and the department head. The court held that the speech essentially concerned the employee's personal disputes, and that even if some of the expression involved matters of public concern, the university's interest in "conduct[ing] its affairs without constant disruptions due to factionalism and machinations of troublemakers" outweighed the employee's freedom of expression.[73]

Similar conflicts appear in cases involving free speech claims by public school employees. Three North Carolina cases follow.

In *Gregory v. Durham County Board of Education*[74] two public school teachers, Anne Gregory and

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71. 776 F.2d at 453-54.

72. 578 F. Supp. 241 (E.D. Ky. 1984).

73. *Id.* at 246. *See also* Mahaffey v. Board of Regents, 562 F. Supp. 887, 890 (D. Kan. 1983) (faculty member's advocacy of creating separate department for his area and publicizing to class a student's paper critical of certain administrative decisions within the department are "quintessentially" matters of individual, not public, concern); Jordan v. Board of Regents, Univ. Sys., 583 F. Supp. 23, 28 (S.D. Ga. 1983) (personal complaints about the internal operation of the university not protected speech); Ballard v. Blount, 581 F. Supp. 160, 163-64 (N.D. Ga. 1983) (faculty member's grievance concerning the amount of his salary increase, the method of assigning freshman English courses, the appropriateness of a course syllabus, and the procedures for review and approval of course syllabi held to constitute speech on personal, not public, concern).

74. 591 F. Supp. 145 (M.D.N.C. 1984).

Steve Toggerson, challenged the placement of letters in their personnel files as retaliation for the exercise of their free speech rights. The court considered their claims separately.

Anne Gregory had filed a grievance with the school system over the requirement that she attend a mandatory teacher-training program that conflicted with her vacation plans. She also sent a letter to the school superintendent protesting the requirement that she attend the training and expressing general dissatisfaction with the administration. Applying the first prong of the *Connick* test to Gregory's complaint, the court held that her criticisms of the administration by a grievance and a letter, written solely on her behalf and not on behalf of her co-workers, were "quintessentially matters of personal concern tied to a personal employment dispute."[75] Gregory thus failed to meet *Connick*'s requirement that the speech be on a matter of public concern.

Steve Toggerson's criticism of the administration took a different form. Toggerson wrote an article for the newsletter of the local teachers' association alleging that the superintendent opposed legislation to grant greater employment protections for teachers. The superintendent responded to Toggerson's article by letter, stating that while he respected Toggerson's free speech rights, the article was not true and undermined the superintendent's working relationship with the schoolteachers.

The court held that Toggerson's speech satisfied the first prong of the *Connick* test, but just barely:

> The orientation of Toggerson's article is also toward personal employment concerns. Although the issues it addresses are of some legitimate interest to the public, they also have a very significant impact on Toggerson herself as a teacher. These include whether the Superintendent ac-

75. *Id.* at 153.

> tively opposes fair employment and dismissal procedures for teachers, increased teachers' salaries, and efforts by teachers to obtain a meaningful role in policy formation. Moreover, the article was not sent to the public generally but only to teachers in the Durham County system. Because the article bears only an attenuated relationship to the public and its concerns, the first amendment interest of Toggerson in it is limited.[76]

Then, on the second prong of the *Connick* test, the court resolved the balance of interests in favor of the employer. The factors considered by the court were (1) whether the employee had a personal involvement in the matter, (2) whether the speech tended to harm the superintendent's professional reputation, (3) whether the speech tended to undermine working relationships essential to efficient operation of the employer, and (4) whether the challenged personnel actions would tend to chill the employee's exercise of free speech. The court answered in the affirmative on the first three factors and in the negative on the fourth. The court thus denied Toggerson's free speech claim.

In *Daniels v. Quinn*[77] a teacher's aide, Carmalita Daniels, alleged that the principal of the school refused to rehire her because she exercised her free speech rights.

While working as an aide, Daniels had occasion to discuss her work with a member of the school board. When the board member asked Daniels how school was going, Daniels replied that she had not yet received certain materials she needed for a remedial reading course. The board member asked the superintendent to look into the matter. He did so, and he also asked the principal to tell Daniels that she should bring her problems through administrative channels.

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76. *Id.*

77. 801 F.2d 687 (4th Cir. 1986).

Daniels was not rehired for the next school year, and alleged the principal's decision was in retaliation for her comments to the school board member.

Turning to the first prong of the *Connick* test, the court concluded that Daniels's comments to the school board member concerning the failure to receive her teaching materials was not speech on a matter of public concern. The court characterized the scope of protected speech narrowly, rejecting the notion that it included every bureaucratic complaint. Rather, held the court, "matters of public concern must relate to wrongdoing or a breach of trust, not ordinary matters of internal agency policy."[78] Because Daniels's comments did not allege any misconduct or abuse of office on the part of school system officials, then, it was not protected speech:

> Questions of this sort do not belong in federal court. They are best resolved by local school boards and individual school administrators. To accord to all such grievances the status of protected speech is to invite a measure of educational involvement that federal tribunals are ill equipped to take.[79]

Just one year later, however, in *Piver v. Pender County Board of Education*[80] the Fourth Circuit apparently abandoned the narrow standard announced in *Daniels v. Quinn* that only speech alleging malfeasance or abuse of office was protected. In *Piver* a North Carolina schoolteacher's criticism of the Pender County School Board's proposal to dismiss the principal of the Topsail Beach school in which he worked was held to be protected speech. Stated the court:

> Pickering, its antecedents, and its progeny—particularly

78. *Id.* at 690.
79. *Id.*
80. 835 F.2d 1076 (4th Cir. 1987).

> Connick—make it plain that the "public concern" or "community interest" inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee—most typically, a private personnel grievance. The focus is therefore upon whether the "public" or the "community" is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.[81]

Because the teacher's speech addressed "a matter in which the community of Topsail Beach was vitally interested"[82]—the retention of the principal of the local school—it satisfied the first prong of the *Connick* test. Turning to the second prong of the test, the court noted that Piver's comments were made at an open meeting of the school board called for the very purpose of discussing the issue on which Piver spoke, and that as a teacher in the school Piver had particular expertise on the matter. In contrast, the school board "asserted only a threat of 'turmoil' at the school."[83] The court thus struck the balance of interests in favor of the employee.

Cases concerning public school employees and their concerns about school arise in other federal circuits. For instance, in *Jett v. Dallas Independent School District*[84] Norman Jett claimed his dismissal as football coach was in retaliation for his comments, published in the local newspaper, that only two ath-

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81. *Id.* at 1079-80, citing Berger v. Battaglia, 779 F.2d 992, 998-99 (4th Cir. 1985).

82. 835 F.2d at 1080.

83. *Id.* at 1081.

84. 798 F.2d 748 (5th Cir. 1986).

letes at his school could meet NCAA academic eligibility requirements. The court held that Jett's remarks concerned "the academic development of public high school football players" and "certainly addresse[d] matters of concern to the community."[85] The court resolved the *Connick* balance in the employee's favor. Further, in *Lees v. West Greene School District*[86] plaintiff Karen Lees, a substitute schoolteacher, claimed she was not selected for a permanent position because she spoke at a school board meeting against the proposed transfer of a social studies teacher to an English teaching position. Lees argued that the transfer would undermine the quality of instruction in English, and that the position should be filled by someone with background as an English teacher. The court held that Lees's speech addressed the quality of education in public schools and was thus on a matter of public concern. And in *Roberts v. Van Buren Public Schools*[87] a teacher's complaint about the sacrifice of books to allow expenditure for other classroom supplies was held to be a matter of public concern.

Thus, a number of decisions recognize complaints aired by teachers and professors involving the quality of academic services as speech on a matter of public concern. Certainly, however, the cases turn on fine distinctions: The employee complaint about the inadequate facilities (missing textbooks) held to be a personal dispute in *Daniels v. Quinn* is difficult to distinguish from the teacher's complaint about the inadequate facilities (discontinued books) held to be a matter of public concern in *Roberts v. Van Buren Public Schools*. Similarly, the result in *Pressman v. UNC–Charlotte* is difficult to reconcile with the result in *Johnson v. Lincoln University*, as both involve

85. *Id.* at 758.
86. 632 F. Supp. 1327 (W.D. Pa. 1986).
87. 773 F.2d 949 (8th Cir. 1985).

speech on how well a university was run, but only one was held to be protected. Again, while one can generally state that speech on the quality of public education is a matter of public concern, it is not at all clear which statements will be found to fit that category.

Further, assuming the court deems the speech protected, the balancing of interests in these cases is also difficult to predict. If the speech is made in a setting in which no disruption of school operations is shown, such as the school board meeting in *Piver v. Pender County*, then the balance will probably tilt in favor of the employee. Cases such as *Johnson v. Lincoln University* allow for the possibility that even if the speech does disrupt the workplace, as Johnson's arguments with his colleagues did, the court may nonetheless strike the balance in the employee's favor.

5. *Speech Concerning Discrimination*

ANOTHER CATEGORY of cases involves speech by employees concerning discrimination on the basis of race or sex. With the Supreme Court's ruling in *Givhan v. Western Line Consolidated School District*[88] that allegations of discriminatory practices made in a one-on-one meeting between a teacher and her principal were protected speech, the door was opened for other employees to similarly assert that their claims of discrimination constituted speech on a matter of public concern. These cases are near the end of the spectrum of protected speech, however, as the discrimination issues are usually aired in the context of

88. 439 U.S. 410, 413 (1979). In *Givhan*, a schoolteacher expressed her opposition to certain school board policies as racially discriminatory in one-on-one meetings with her supervisor. These discussions were held to constitute speech on a matter of public concern, even though they took place in private. *Id.* at 415 n.4.

the personal claims of an individual employee. Nonetheless, some courts have found this type of speech to satisfy the *Connick* standard.

In *Dougherty v. Barry*[89] plaintiff Edward Dougherty, a white fire fighter formerly employed by the District of Columbia, claimed his being passed over for promotion was due, in part, to his participation in a rally held to protest discriminatory promotion policies of the District government. The court cited *Givhan* and *Connick* to support its finding that Dougherty's participation in the rally was speech entitled to protection under the First Amendment, and that his failure to be promoted was attributable, in part, to his speech.

Similarly, in *Pollard v. City of Chicago*[90] plaintiff Henry Pollard alleged he was suspended and involuntarily transferred as a result of concerns he voiced to his supervisor that a black, female co-worker was the target of sexual and racial harassment by other employees. The court held that Pollard's "speech identifying potentially actionable discrimination by government employees constitutes a matter of public concern."[91] And in *O'Connor v. Peru State College*[92] the complaints of the women's physical education instructor concerning the inadequacy of facilities for the women's basketball team were held to constitute speech on a matter of public concern in that they raised the issue of equal treatment for women athletes. The court found no causal link between the instructor's speech and the nonrenewal of her contract, however.

89. 604 F. Supp. 1424 (D.D.C. 1985).

90. 643 F. Supp. 1244 (N.D. Ill. 1986).

91. *Id.* at 1249. *See also* Patterson v. Mason, 594 F. Supp. 386 (E.D. Ark. 1984) (speech by schoolteacher in opposition to production of high school play she thought racist held protected; however, causal link between speech and denial of promotion not proved).

92. 606 F. Supp. 753 (D. Neb. 1985).

In contrast, courts typically view individual allegations of discrimination as no more than a private dispute with the employer. For example, in *Lipsey v. Chicago Cook County Criminal Justice Commission*[93] plaintiff Robert Lipsey claimed his termination as an assistant planner was in retaliation for a letter he wrote to his supervisor complaining that he was underpaid because he was black. Lipsey claimed that the letter was protected speech concerning the agency's policy of race discrimination. The court held that Lipsey's comments, made as part of a salary dispute and expressing his personal dissatisfaction in his level of compensation, merely represented a personal gripe and were not speech on a matter of public concern.

Where an employee's speech addresses general concerns of discriminatory policies or practices by public employers, not limited to individual allegations of discrimination, the courts may hold that the speech is on a matter of public concern. The balance of interests may be struck in the employee's favor where, as in *Pollard v. City of Chicago*, the employee identifies potentially discriminatory policies in a non-disruptive way. Where, on the other hand, the complaint is no more than an individual grievance, even if the grievance alleges discrimination, the courts are likely to rule that the matter is not protected speech.

6. *Speech on Matters of Purely Personal Interest*

THE COURTS have refused to extend First Amendment protection to speech on matters of purely personal interest, consistent with *Connick*'s admonition that "government offices could not function if every employment decision became a constitutional matter."[94] Perhaps the most frequent reason cited by the

93. 638 F. Supp. 837 (N.D. Ill. 1986).
94. 461 U.S. at 146.

courts for finding speech outside the bounds of First Amendment protection is that the speech arose as part of a grievance. A representative sampling of these decisions, beginning with a case arising in North Carolina, follows.

In *Lewis v. Blackburn*[95] a magistrate, Georgia Lewis, protested to a chief district court judge and certain members of the North Carolina General Assembly about a new work requirement concerning additional microfilming duties. The judge she worked for told her that she would not be reappointed to her magistrate position because she had difficulty in working with departments and because she refused to keep records as prescribed by an employee manual. In her lawsuit Lewis alleged that the failure to reappoint her was in response to her previous protest to court officials and others, in violation of her First Amendment right to free speech.

The first time the court of appeals heard Lewis's case, it agreed that her protest constituted speech on a matter of public concern. Stated the court: "To our minds, the fact that a judicial system is so understaffed and underfunded that judges are required to spend their time microfilming case documents other than judgments rather than performing judicial duties is of substantial concern to the public."[96] The court then resolved the balance of interests in her favor.

Judge Ervin dissented. Citing *Connick*, he disagreed with the majority's characterization of Lewis's protest as protected speech: "Here, it is beyond dispute that Lewis' complaints began upon learning that she would be assigned additional duties. The record as I view it is unequivocal that the motivation for her

95. 734 F.2d 1000, *rev'd and remanded*, 759 F.2d 1171 (4th Cir. 1985).

96. 734 F.2d at 1005.

complaints was personal effrontery over being asked to do more work, not public-spirited concern over the administration of justice."[97]

On rehearing the court of appeals reversed, citing the reasons in Judge Ervin's dissent to the original opinion.[98] As a matter of law, concluded the court, Lewis's speech concerning the assignment of additional duties was not a matter of public concern.

In *Cook v. Ashmore*[99] plaintiff Phillip Cook was notified in 1980 that his employment as director of a college continuing education program would be terminated because he had not generated sufficient funds. Cook filed a grievance with the college, claiming his termination was not made with adequate notice; the college sustained his grievance, and his employment was extended to the following year without renewal. Cook claimed the failure to renew his contract was in retaliation for his having filed the grievance, in violation of his free speech rights. The court held that the grievance on the amount of notice due Cook was clearly a matter of personal, not public, concern and thus failed to meet the first prong of the *Connick* test.

Similarly, in *Simon v. City of Clute, Tex.*[100] a written grievance presented by a group of former and current police officers to the city council alleging favoritism and arrogance by the police chief was held to be a mere personal complaint. In *Singh v. Lamar University*[101] a plaintiff's claim that he was denied tenure in response to his having successfully grieved previous adverse promotion decisions was held to constitute a matter of purely personal interest. And

97. *Id.* at 1010.
98. 759 F.2d 1171 (4th Cir. 1985) (per curiam).
99. 579 F. Supp. 78 (N.D. Ga. 1984).
100. 646 F. Supp. 1280 (S.D. Tex. 1986).
101. 635 F. Supp. 737 (E.D. Tex. 1986).

in *Sipes v. United States*[102] an employee's claim of retaliation for complaints of unequal treatment was held to be no more than a personal concern about personnel actions affecting his employment.[103]

The fact that an employee's speech was made in the context of a grievance is not dispositive, however.[104] Rather, the critical inquiry is whether the substance of the grievance, taken as a whole, "deals

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102. 744 F.2d 1418 (10th Cir. 1984).

103. *See also* Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir. 1984) (officer's urging another officer to appeal suspension a private personnel dispute); Saye v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862, 866 (10th Cir. 1986) (teacher's complaints to parents about cut-back on student aide time held extension of her personal dispute with principal); Davis v. West Community Hosp., 755 F.2d 455, 461-62 (5th Cir. 1985) (surgeon's criticism of hospital personnel and ineffective patient treatment held to involve only personal grievances against various co-workers and administrators); Owens v. City of Derby, 586 F. Supp. 37, 41 (D. Kan. 1984) (police officer's grievance critical of mayor and other city officials not protected speech); Ferrara v. Mills, 596 F. Supp. 1069, 1071 (S.D. Fla. 1984) (complaint by schoolteacher about class assignments and hiring athletic coaches to teach social studies, "while tangentially related to matters of public concern, constitutes nothing more than a series of grievances with school administrators over internal school policies"); Thompson v. McDowell, 661 F. Supp. 498, 500 (E.D. Ky. 1987) (statement that agency needed a twenty-four-hour deadline for equipment repairs, that it did not divide its budget fairly, and that the agency should buy only the best equipment at a fair price was an expression of purely personal interest, notwithstanding the fact that the speech involved the expenditure of public funds); Cook v. Ashmore, 579 F. Supp. 78, 80 (N.D. Ga. 1984) (grievance concerning amount of advance notice due before dismissal is not a matter of public concern); Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) (claim of retaliation for submission of overtime pay claim not protected speech); Santella v. Grishaber, 645 F. Supp. 428 (N.D. Ill. 1987) (grievance alleging harassment was speech only on a particular employment decision affecting the individual employee); Lynn v. Smith, 628 F. Supp. 283 (M.D. Pa. 1985) (union steward's grievances over leave and overtime of a purely personal nature); Lehpamer v. Troyer, 601 F. Supp. 1466 (N.D. Ill. 1466) (police officer's suspension not in retaliation for speaking out against poor evaluation, and evaluation is a purely personal matter); Gearhart v. Thorne, 768 F.2d 1072 (9th Cir. 1985) (grievance refuting charges of ineptitude not speech on a matter of public concern); Gay v. United States Postal Service, 800 F.2d 64 (3rd Cir. 1986) (employee's claims that he was denied employment because of his safety

with individual personnel disputes and grievances . . . of no relevance to the public's evaluation of the performance of governmental agencies, [or] concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government."[105] And indeed, there are a few instances in which speech made in the context of a grievance has been held protected under the first prong of the *Connick* test.[106] By and large, however, it is difficult for an employee to overcome the initial determination required by *Connick* that speech made in a grievance address a matter of public concern.

C. Summary

THE CLASSIFICATIONS of free speech represent points along the continuum described by Justice White in *Connick*. As is obvious from the review of these cases, where a given statement might fall on the continuum is difficult to predict. As a general approach, however, it is suggested that as one proceeds further away from speech on matters of current community debate or speech alleging abuse of public office, the less likely it is that the speech will be deemed protected under the First Amendment.

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complaints and union activities held purely personal complaint); Berry v. Bailey, 726 F.2d 670, 675-76 (11th Cir. 1984) (refusal by deputy to heed sheriff's directions to dismiss charges was insubordination, not protected speech alleging corruption).

104. Connick v. Myers, 461 U.S. at 147-48; Davis v. West Community Hosp., 755 F.2d 455, 461.

105. McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983), citing Thornhill v. Alabama, 310 U.S. 88 (1946).

106. *See, e.g.*, Roberts v. Van Buren Public Schools, 773 F.2d 949, 956 (8th Cir. 1985).

DETERMINING FREE SPEECH PROTECTION: A FINAL WORD

THE SUPREME COURT clearly telegraphed its concern in *Connick* that public employees might frustrate legitimate discipline by their employers by bringing spurious free speech claims. To avoid that possibility, the Court has constructed a spectrum of speech and requires an employee seeking First Amendment protection to demonstrate that the speech fits somewhere on that spectrum as speech on a matter of public concern. If an employee does so, the courts must still determine whether the First Amendment interests of the employee outweigh the employer's interest in an efficient operation.

One problem evidenced by the lower court decisions rendered since *Connick* is that the courts have not defined with certainty what speech is protected. However, one may identify broad categories of speech from which one can perhaps surmise, if not predict, which speech is protected.

A second problem is that even if the speech is deemed a matter of public concern, the way in which the balance of interests will be struck is difficult to predict. Again, one may conclude from the cases that

an employee who speaks in a nondisruptive way or through established channels (such as public meetings or newspapers) has a greater chance of prevailing than does an employee who stages a noisy protest, but there are cases in which disruptive speech has been held, on balance, to be protected.

It is hoped that this book will be of help to employers and employees in determining the scope of the free speech right and the factors that may tip the scale one way or the other.

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